

More detention,
fewer safeguards:

How the new EU Pact on
Migration and Asylum creates
new loopholes to ignore
human rights obligations

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PLATFORM FOR INTERNATIONAL COOPERATION ON
UNDOCUMENTED MIGRANTS

The new [European Pact on Migration and Asylum](#), published on 23 September 2020, begins with the recognition that “migration has been a constant feature of human history” and that “with a well-managed system, migration can contribute to growth, innovation and social dynamism”. While these statements would indeed define a coherent migration policy, the Commission has not translated them into the real contents of the policy.

Instead, with its five legislative proposals and four recommendations, the Pact proposes to build a system where deterring all unauthorised mobility and increasing deportations are the defining features of the EU’s migration policy in the coming years. This would be carried out by reducing safeguards, setting unrealistic timeframes to have fair procedures, and increasing detention - with little or no consideration for human rights, welcoming or inclusion. The investment of resources and political attention in preventing access to the territory and removing people from the EU far outweighs all other aspects of the policy, despite the text acknowledging that the vast majority of migration is regular.

Hardly definable as “a fresh start”, this system rather builds on and expands previous reforms and proposals, such as the massive reinforcement of the [European Border and Coast Guard](#), the proliferation of “hotspots”, the adoption of the [interoperability](#) regulations creating and expanding biometric databases and access to data on third country nationals, and the [proposed Recast Return Directive](#).

PICUM would like to underline the following six concerns about the proposed Migration and Asylum Pact:

- 1. Rather than closing “loopholes”, the Pact proposes to create them to avoid legal safeguards and to deny access to other residence procedures.**

One of the key objectives of the Pact is to “close the loophole between asylum and returns”, a phrase already heard on several occasions in the past months. To this end, the Commission proposes the large-scale application of “seamless” [asylum and return border procedures](#). The “seams” in this case seem to be human rights and legal safeguards to uphold them. The legislative proposals actually set out to create legal loopholes that can be used to deny people access to fair procedures and create more ‘grey zones’ where different laws and procedures apply.

This binary approach, which implies that everyone who is denied asylum should be immediately returned, deprives people of the possibility of accessing pathways for regularisation under other grounds according to Member States’ national legislation¹, and removes important safeguards related to non-refoulement, [best interests of the child](#) and protection of family and private life.

The proposals are built on the legal fiction that people in the border procedures will not be formally “authorised to enter the Member State’s territory”, despite already being physically

¹ For instance, more than [half of EU member states](#) provide a temporary residence permit on medical grounds; at least [five countries](#) have legislation granting special permits for undocumented victims of domestic violence; and at least [eight countries](#) have regularisation mechanisms for children, young people or families.

present on the territory. This raises concerns on how access to these procedures will be regulated and how to ensure accountability in case of human rights violations.

2. The new border procedures will lead to increased and longer detention.

During the [pre-entry screening](#), everyone crossing an external border irregularly, or disembarked after search and rescue (SAR) operations, will be automatically detained in designated facilities for up to ten days. During this time, access to information and to medical care will be severely curtailed. After this period, people will be channelled into the return or asylum procedures, which, for the majority of people, will take place in the same border facilities. The same screening procedures will also apply to people already on the EU territory, independent of how long they have been living in Europe, if there is no indication that they have entered regularly. In this case, people can be detained in specialised facilities for up to three days.

For the whole duration of the asylum and return border procedures, which can last up to six or even ten months in cases of ["exceptional mass influx" or risk of it](#), detention will be the norm. In clear violation of [international principles](#) of necessity and proportionality, the Pact permits continued detention for the whole duration of the asylum and return border procedures, with no reference to the obligation to prioritise alternatives to detention.

The idea of applying the pre-entry screening procedures to people arrested within the territory is a shameless attempt to extend these legal "loopholes" to deny fundamental rights to resident individuals and groups. People and communities of colour that already face discriminatory policing and police harassment now risk further checks and imprisonment of up to three days without judicial review or access to a lawyer during the screening procedure. It is hard to understand how this can be in line with recent EU commitments in the newly released [EU Action Plan Against Racism](#) to "countering discrimination by law enforcement authorities" and avoiding "profiling that results in discrimination".

3. The EU mantra to increase returns is reinforced with more tools and fewer safeguards.

Deportation is an extreme and harmful measure that often breaks economic, social and family ties. Civil society and [researchers](#) have pointed to the concerning lack of evidence and knowledge of what happens to people after they are deported, and how the [experience of deportation](#) has an impact on the lives of parents and children, as well as future choices and opportunities.

Yet increasing returns, including to deter irregular migration, is presented as the overriding objective of the common framework. The term "return" appears more than 100 times in the Commission [Communication](#) on the Pact alone – while the term "rights" only 14.

The increase in returns is pushed through several measures and initiatives:

- > the reduction of procedural safeguards, such as the lack of legal aid and accessible information in the [pre-entry screening procedures](#), and limitations to the right to appeal against negative decisions;
- > the creation of the “[return sponsorship](#)” scheme as a form of “solidarity” among member states, under which a state will be able to organise the deportation of an undocumented person living in another member state, rather than relocating them²;
- > [new structures](#) with dubious roles and unclear mandates: a Return Coordinator within the Commission, supported by a new High Level Network for Return; and a Frontex Deputy Executive Director on Returns;
- > the renewed push towards prioritising readmission agreements in all relations with third countries with the exception of humanitarian aid.

These measures will likely lead to increased risks of human rights violations and reduced safeguards during return procedures, with increased challenges in ensuring accountability.

4. Contrary to the global definition of children until they are 18, the Pact suggests that only children younger than 12 years old should be protected from some harmful procedures.

The [provision](#) that “the best interests of the child shall be a primary consideration for Member States with respect to all procedures” is welcome, as are the increased resources for guardians for unaccompanied children, the increased emphasis on alternatives to detention for children and the provision of non-discriminatory access to education.

In addition, the Commission steps back from imposing one of its most harmful innovations - the obligatory border procedures - on young children. Those who are under 12 are exempt from these procedures, as well as children who are unaccompanied. However, children aged 12-18 who are accompanied by their parents or other caregivers are required to undertake the border procedures, which translate into almost automatic detention and lack of access to regular pathways beyond asylum.

Despite the [internationally](#) recognized definition of children being every person until the age of eighteen, the proposal draws a new line in the middle of adolescence, imposing the new regime on children above the age of 11, and allowing their detention – for potentially up to 10 months, as far as they are with their family.

This provision, as well as the possibility to still detain younger children and unaccompanied children for national security reasons, infringes international and regional [standards](#) that clearly consider child immigration detention as a violation of the rights of the child.

2 If the deportation will not take place within eight months, the state will have to relocate the undocumented person in their country, raising concerns on their living conditions in the state of relocation as well as their risk to end up in a legal limbo.

5. Civil society will now be at an even greater risk of harassment, criminalisation and restricted access to border areas.

The [Commission Guidance](#) on the implementation of EU rules on the definition and prevention of the facilitation of unauthorised entry, transit and residence only invites member states not to criminalise acts that are “mandated by law”, which are very different from acts “permitted by law”. Activities like providing food, shelter, car lifts or information, all remain excluded, in particular when they’re not carried out by an official NGO which is “mandated” to carry out such activities. The almost exclusive focus on search and rescue also risks leaving out activities on the territory and activities that are not directly life-saving.

Search and rescue operations are only considered legitimate when they “observe the instructions received from the coordinating authority” and while “complying with the relevant legal framework”, which leaves the door open to prosecution of NGOs under (often trumped-up) accusations of breaching national legislation or instructions on disembarkation.

The Pact does indicate that EU member states “may” authorise relevant NGOs to provide information and monitor fundamental rights at borders. Yet there is no clear obligation to grant NGOs access to border facilities, and some member states have already [criminalized](#) civil society organisations for providing life-saving information. There is a concern that the right to provide information is no longer a priority. The collective impact of these measures likely legitimises and expands practices of criminalisation of NGO operations at external borders, as already happening for instance in [Hungary](#) and [Croatia](#).

6. There are some promising elements towards inclusion, but the Pact sidelines the importance of labour migration for European economies and societies.

The significance of labour migration for European economies and societies is not reflected in the Pact, whether we look at the political messaging, resources, proposals, actions, or word count. On balance, the plans in the area of labour migration are relatively timid and overshadowed by the focus on return.

Nevertheless, the recognition of the need to better protect labour migrants from exploitation and to facilitate more labour migration across skills levels is very welcome. The main idea to increase labour migration, at least in the short term, is to launch so-called “[Talent Partnerships](#)” in the EU’s Neighbourhood, the Western Balkans, and in Africa. We are keen to see how the new measures might have the potential to increase decent labour migration pathways across sectors and skill levels, including in those sectors currently characterised by low wages, where many migrant workers are carrying out essential work and unable to access permits.

The public [consultation](#) that the Commission has opened on regular migration builds on the conclusions of the [extensive review of the regular migration framework](#) completed in 2019. Therefore, we hope that the ideas already put forward in this context will be seriously

considered, and that the consultation will represent another step towards concrete actions, rather than being a rerun of the discussions of previous years.

We hope the emphasis on integration and inclusion will also bear fruit, with an ambitious and inclusive action plan. Integration and inclusion necessarily involve various different sectors and policy areas of national and local competence. The common EU framework should avoid unnecessary and bureaucratic limitations which might impede, rather than support, [local initiatives](#) which are adapted to the needs and realities of communities. To be responsive to the local level, where integration is carried out, the new EU framework on integration should include all third country nationals, regardless of status, who are continually and effectively residing and participating in local life.

Next Steps

In its [Roadmap](#) to implement the Pact, the Commission proposes a very ambitious workplan, urging the European Parliament and the Council to adopt the proposed regulations by mid-2021 at the latest.

This short timeline ignores the detrimental – and potentially irreversible – impact of these proposals on the fundamental rights of those with few other options but to arrive in Europe in an irregular manner, as well as those who are currently undocumented in the EU. If the proposals were to be adopted in their current form, little would distinguish the European Union, self-declared [champion](#) of fundamental rights at the global level, from [countries](#) regularly detaining people and families in inhumane camps at their external borders, in view of their rapid deportation.

In these months of hard work ahead, we urge the European Parliament and the Council to consider the impact these proposals will have on migrants' lives, civic space in the EU and the rule of law more broadly.